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92-1795

No._____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

NICHOLAS ALFRED RATTENNI,
also known as Alfred Nicholas Rattenni and
A-1 COMPACTION, INC.,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Authorities ii

Petitioners' Reply Memorandum 1

Conclusion 4

TABLE OF AUTHORITIES

Page No.

Bourjaily v. United States 483 U.S. 171 (1987) 2

United States v. Cota, 953 F.2d 753 (2nd Cir. 1992) 1

United States v. Silverman, 861 F.2d 571 (9th Cir. 1988) . . 1, 2

United States v. Washington, 952 F.2d 1402 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1173 (1992) 1

PETITIONERS' REPLY MEMORANDUM

In its opposing brief in No. 92-1795, the United States mischaracterizes, in three principal respects, the thrust of petitioners' arguments as well as the holding of the Second Circuit in the matter *sub judice*.

First, the Solicitor General argues: "Petitioners contend (Pet. 12) that the court of appeals' unpublished decision in this case conflicts with *United States v. Silverman*, 861 F.2d 571 (9th Cir. 1988) and *United States v. Washington*, 952 F.2d 1402 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1173 (1992)." Brief in Opp., p.6. The fact of conflict is one articulated by the Second circuit, not merely by petitioners. The Second Circuit wrote:

> Although the Ninth Circuit has indicated that the extrinsic evidence must be "fairly incriminating" since the co-conspirator's statement itself is presumptively unreliable, see *United States v. Silverman*, 861 F.2d 571 (9th Cir. 1988), we do not require the District Court to weigh the extrinsic evidence independently of the co-conspirator statements. See *United States v. Cota*, 953 F.2d 753, 759 (2nd Cir. 1992).

Pet. App. A5

Crystal clarity as to the enormous difference between the approach of the Second And Ninth Circuits is available only by careful review of *Silverman*. Within the jurisdiction of the Ninth Circuit, district courts may not cease analysis upon receipt of "some evidence" independent of the proferred co-conspirator's statements (861 F.2d at 577-78), in contrast to district courts within the jurisdiction of the Second Circuit. Rather, in the Ninth Circuit, a district court must further determine whether such extrinsic evidence is itself "fairly incriminating." As *Silverman* specifies, "evidence of conduct that is completely consistent with defendant's unawareness of the conspiracy" is insufficient (861 F.2d at 578).

Second, the Solicitor General asserts: "Contrary to petitioners' suggestion, the Ninth Circuit did not hold in *Silverman* that Rule 801(d)(2)(E) requires a district court to evaluate the extrinsic evidence separately to determine whether it *establishes* the defendant's participation in the conspiracy." (Brief in Opp., p.6 [emphasis added]). The foregoing misstates the position of petitioners, for it suggests that petitioners argue that the state of the law is now as it was prior to this Court's decision in *Bourjaily v. United States* 483 U.S. 171 (1987). Rather, petitioners "suggest" only that the nature and rigor of the analysis applied by district courts to the "corroborating" evidence now varies from circuit to circuit.

Bourjaily clarified that a co-conspirator's out-of-court statement should be included in a district court's assessment of whether the statement should be admitted to evidence. The Court specifically

refrained from passing on whether that statement could be admitted without any proffer of independent, corroborating evidence. If it is assumed, as do several circuits, that "some" extrinsic evidence is required, the question necessarily remains as to *how* probative such must be of a co-conspirator's participation in the conspiracy, else the evidence be without value and the additional requirement serve no purpose. Further, even if the force of logic does not compel this separate procedure, the Ninth Circuit, among other courts, holds that such is required. In contrast, the Second Circuit plainly has asserted that it will not weigh the independent evidence, so long as there is a proffer of "some" evidence. The Ninth Circuit will not abide this, holding that the independent evidence must be "fairly incriminating" and that evidence consistent with non-participation will not suffice.

Third, the Solicitor General bemoans the fact that here, there is some independent evidence, and consequently there is no issue presented. ("Because the government did not rely *solely* on the co-conspirator statements alone to establish Rattenni's involvement in the conspiracy to bribe state troopers, the court of appeals did not address the question on which petitioners seek review." Brief in Opp., p.5 [emphasis added]). However, the point is that such evidence would not have sufficed, we submit, under the scrutiny applied by the Ninth Circuit, nor would it have fared better under the "substantial" evidence test of the District of Columbia Circuit. It is only due to the Second Circuit's analytic indifference to the quantum or character of the independent evidence that judgment was affirmed.

CONCLUSION

For the reasons set forth above and in the petition, a writ of certiorari should issue to review the Summary Order of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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